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A spy law that harms national security

By Joseph R. Biden Jr.

The Intelligence Identities Protection Act of 1981, which now seems certain to be enacted into law this year, is not the kind of legislation which captures the public's imagination.

Its title is awkward and its subject is arcane — it deals with a problem which directly affects only a small handful of people who are engaged in activities that most people know nothing about.

But the legislation is still important to all Americans.

The legislation's intended purpose is sound and necessary. It would allow federal prosecution of former Central Intelligence Agency personnel and others who deliberately impair American intelligence operations — and jeopardize agents' lives — by publicizing the names of American agents working covertly abroad.

Various individuals have been engaged in efforts of this kind in recent years and both supporters and opponents of the Intelligence Identities Protection Act agree that these efforts must be stopped in the interest of national security.

The problem with the act is the language it employs to establish standards for prosecution. The language finally adopted by both the House and Senate is so broadly drawn that it would subject to prosecution not only the malicious publicizing of agents' names but also the efforts of legitimate journalists to expose any corruption, malfeasance, or ineptitude occurring in American intelligence agencies.

Because of this, the legislation ultimately will harm, not help, our national security interests in one of two ways:

- Either it will be declared unconstitutional, leaving intelligence agents without the protection they need until Congress can come back and try to fashion new legislation which does not so blatantly trample on First Amendment guarantees;

- Or, if left to stand, it will curtail legitimate journalistic scrutiny of a particularly important and sensitive area of government, creating the possibility that wrongdoing or wrong-headedness could flourish in that area, unchecked by public awareness.

The language in the legislation which causes this problem is the phrase "reason to believe." As passed by the House and Senate, the legislation states that anyone who publishes the name of an agent with "reason to believe" that publication will impair or impede American intelligence activities is in

violation of the law.

"Reason to believe" is an unnecessarily broad and inappropriate standard for determining criminal liability in these situations.

A newspaper reporter who has learned, for example, that a CIA agent has been co-opted by a foreign power might well face a situation in which he or she would have to expose agents' names to write the story and have "reason to believe" that this might impair or impede some aspect of American intelligence activities. The reporter would therefore be subject to criminal prosecution even though publication of this story might well serve the overall interests of our national security.

The mere threat of such prosecution would be enough to dissuade many news organizations from pursuing stories of this kind, out of fear of the legal entanglements and cost which might result even if a reporter is finally acquitted.

Recent history has shown that stories of this kind do occur. It is not that long ago that the CIA was found to be improperly spying on innocent Americans, despite official protestations to the contrary. The more recent activities of two former CIA agents who sold their services to the Libyan government have posed many troubling questions about agency procedures. The American people have the right and need to know of such matters.

Efforts were made in the Congress to make the Intelligence Identities Protection Act more acceptable by replacing the "reason to believe" standard with a standard of "intent" — a standard which would subject to prosecution only those who publish the names of agents with an "intent" to impair or impede American intelligence activities. This small word change would have clearly focused the legislation on the problem it was meant to solve and at the same time minimized its effect on legitimate journalists. The nation's intelligence community agreed that this change would have gotten the job done. Unfortunately, the Congress did not accept it.

In the last analysis, a free and inquiring press is the most reliable check the citizens of our nation have against wrongdoing and bad judgment in government, since government, like any individual, is often reluctant to call attention to the errors of its own ways.

It is therefore a mistake for the Congress to pursue legislation which hinders the press from performing this vital function, as it has in this case.

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